No. 16022.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES MEAT AND PROVISION DRIVERS UNION LOCAL NO. 626 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Appellants,

vs.

LEWIS FOOD COMPANY, a corporation,

Respondent.

RESPONDENT'S BRIEF.

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Appellants,

vs.

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RESPONDENT'S BRIEF.

I.

The District Court Correctly Held That This Action Should Not Be Abated Under the Doctrine of Primary Administrative Jurisdiction.

The contention of Appellants in support of their plea in abatement is that there is a proceeding pending before the National Labor Relations Board in which the bona fides of the certified union and the certification itself is to be determined and that the District Court under the doctrine of primary administrative jurisdiction should stay proceedings until the National Labor Relations Board has ruled upon such issues in its pending proceedings. The trial court has rejected this contention. The decision of the trial court is found in *Lewis Food Company v. Los Angeles Meat and Provision Drivers,* 159 Fed. Supp. 763.

Respondent's answer to Appellants' contention is two-fold: (1) The Supreme Court of the United States has ruled that this action may be brought prior to an administrative determination that an unfair labor practice has, or has not, been committed; (2) In its prior administrative proceeding against Appellants, *In the Matter of Meat and Provision Drivers Union Local No. 626* (Lewis Food Company), 115 N. L. R. B. 890, 37 L. R. R. M. 142, the National Labor Relations Board has already ruled that Appellants' affirmative defenses, which are the basis for the plea in abatement, do not constitute a valid defense in law; hence, even if the doctrine of primary administrative jurisdiction is applicable, the Labor Board has decided the issue contrary to Appellants' position.

In *I. L. W. U. v. Juneau Spruce Corporation,* 342 U. S. 237, 96 L. Ed. 275, the United States Supreme Court held that suits for damages under 29 U. S. C., section 187 may be brought in a federal district court prior to an administrative determination that an unfair labor practice has, or has not, been committed. The Supreme Court said at 96 L. Ed. 275, 281:

> "Certainly there is nothing in the language of §303 (a)(4) [187(a)(4)] which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather the opposite seems to be true for the jurisdictional disputes prescribed by §303(a)(4) are rendered unfair 'for the purposes of this section only,' *thus setting apart for private redress acts which might also be subjected to the administrative process.*" (Emphasis added.)

The Supreme Court also said at 96 L. Ed. 281, 282:

> "The right to sue in the courts is clear provided the pressure on the employer falls in the prescribed cate-

> gory . . . Here the jurisdictional row was between the outside union and the inside union . . . Petitioners representing one union and employing outside labor were trying to get the work which another union employing mill labor had. That competition for work at the expense of employer has been condemned by the Act."

The trial court in this case stated that the remedy of the employer to recover damages under section 187 "is independent of any action the Board may take to enforce the same provision." The trial court likened this system of statutory remedies to that of a private action for treble damages by persons injured by a violation of anti-trust laws of the United States (15 U. S. C. A. sec. 15), which are in addition to the remedies by criminal and civil action instituted by the Government. (15 U. S. C. A. sec. 1-5.)

In view of the United States Supreme Court determination in the *Juneau Spruce* case, *supra,* it is clear that the doctrine of primary administrative jurisdiction, upon which Appellants' plea in abatement is based, has no application in this proceeding.

II.

Even if the Doctrine of Primary Administrative Jurisdiction Is Applicable, the National Labor Relations Board Has Already Made Its Controlling Administrative Determination Against Appellants.

The generally accepted statement of the doctrine of "primary administrative jurisdiction," is that courts will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the administrative tribunal, where the question demands the exercise of administrative discretion requiring the special knowledge,

experience and services of the administrative tribunal to determine technical and intricate matters of fact and where a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered.

We submit that Appellants have argued themselves into a box in asserting that the doctrine of primary administrative jurisdiction is applicable, since the National Labor Relations Board has already made the administrative determination which is controlling in this case. In the case of *In the Matter of Meat and Provision Drivers Union Local No. 626* (Lewis Food Company), 115 N. L. R. B. 890, 37 L. R. R. M. 142, the National Labor Relations Board had before it the same parties and the same conduct which is the subject matter of this action. In the Labor Board proceeding brought by Respondent against Appellant, Appellants contended that they had not violated section 8(b)(4)(C) of the Labor Management Relations Act, for the reason that the certification of the certified union was invalid at the time Appellants engaged in their strike and picketing. The certification was alleged to be invalid because: (1) The certified union was company dominated, assisted and financed by Respondent in violation of section 8(a)(2); (2) No valid election was held or certification issued because the certified union was not at the time of its organization or certification in compliance with section 9(f), (g) and (h) of the Act.

These defenses, which were raised by Appellants in the unfair labor practices proceedings brought against them by the National Labor Relations Board, are the same defenses which are raised in this case and constitute the basis for Appellants' plea in abatement.

At the hearing of the charges against Appellants, counsel for the General Counsel of the National Labor Rela-

tions Board moved to strike Appellants' affirmative defenses on the ground that they did not constitute a defense in law. The trial examiner granted the motion to strike and the National Labor Relations Board affirmed. The Labor Board said at 115 N. L. R. B. 890, 901, with regard to the validity and effect of its certification of a bargaining agent and Appellants' affirmative defenses in connection therewith:

> "The motion to strike the affirmative defense was granted. The Trial Examiner stated that the certification of the Association had been issued by the Board in the course of a representation proceeding, a type of proceeding over which it had exclusive jurisdiction, that the certification of the Association appeared to have been issued regularly, and to be valid and proper upon its face. He ruled that under those circumstances the Union was restricted to legal procedure to set aside, vacate, or otherwise challenge the certification. He stated that, *even if it were conceded that the action of the Board in certifying the Association was erroneous, an abuse of its discretion, or in excess of its authority, such a legal defect in the Board's determination and its certification, gave no right to the Union to decide for itself that the Board's determination was defective, and the Board's certification a nullity, and proceed to picket the Company as if the certification and the certified representative did not exist.* Fundamental legal procedure required that a decree or certificate of a judicial or quasi-judicial tribunal, issued in a proceeding of which the tribunal had jurisdiction, which appeared valid and proper on its face, be respected as valid, until either the tribunal which had issued the decree or certificate, or higher authority, vacated, set aside, or rescinded the decree in an appropriate legal proceeding.

> *"The Trial Examiner pointed out that the Union at any time could have filed a charge alleging Company domination or interference with the Association and had the issue fully litigated before the Board and the courts, but that the Union could not arrogate to itself the right to decide that the Board's certification was null and void, and then picket the employer, as if the certified representative, and the certification did not exist."* (Emphasis added.)

With reference to the affirmative defense of Appellants that the certification was invalid for the reason that the certified union had not complied with the filing requirements of section (f), (g) (h) of the National Labor Relations Act, the Labor Board rejected this affirmative defense and said at 115 N. L. R. B. 890, 901, 902:

> ". . . this attack upon the certification was a matter similar to the affirmative defense previously stricken in that it involved a determination that the Board, in issuing a certification, had acted in error, or had acted improperly. *It was likewise not an appropriate defense to the labor practices alleged in the complaint* . . . (the Union could not arrogate to itself the right to decide that the action of the Board issuing the certification was a nullity, and proceed as if the certification and the certified representative did not exist and then later plead the Board's alleged error as a defense. Such a procedure, if countenanced by judicial or quasi-judicial bodies, would destroy the orderly procedures of the law." (Emphasis added.)

The National Labor Relations Board, in rejecting the affirmative defenses of Appellants, accepted the reasoning of the Trial Examiner stating at 115 N. L. R. B. 890, 891, 892:

> "For the reasons set forth in the Intermediate Report, we also find that the Trial Examiner properly

rejected the Respondent's affirmative defenses that its conduct was not violative of §8(b)(4)(C) because the Association allegedly was illegally dominated at the time of its certification or because the Association allegedly was not in compliance with the provisions of §9(h) of the Act when it achieved certification."

It is apparent then that the Labor Board, in exercising its "primary administrative jurisdiction" has ruled that its certification of a union is valid until such time as it is revoked by the Board itself and that an order revoking a certification has no retroactive application. The Board has also ruled that Appellants cannot picket Respondent for recognition while there is a certified union in the plant. Of even more importance to this appeal is the fact that the Labor Board has rejected Appellants' contention that it is a defense to Appellants' conduct that the certified union may have been dominated by Respondent during certification, or that the certified union was not in compliance with filing requirements at the time of certification. The Board held, in its administrative proceeding, that the certification was issued by the Board in the course of a representation proceeding, over which the Board has exclusive jurisdiction, and that the certification is valid until either the Board or higher authority vacates, sets aside or rescinds the certification in an appropriate legal proceeding. It is the conclusion of the Board that Appellants can not decide for themselves that the action of the Labor Board, in issuing the certification, was a nullity and thereupon proceed to strike and picket Respondent.

In *Parks v. Atlanta Printing Union,* 243 F. 2d 284, cert. den. 354 U. S. 937, 1 L. Ed. 2d 1537, an employer brought an action against a union, which had not been certified as the bargaining represenative of the employer's workers, for damages for causing a strike for recognition

in violation of section 303. The Circuit Court held that, under this statute making it unlawful for a union to strike in order to force an employer to bargain with it when another union has been certified and giving the employer an action for damages against the non-certified union, *the decisive factor is the certification by the Labor Board,* and the uncertified union violates the law when it strikes to force recognition, even though the certified union is no longer functioning as a bargaining representative and though it no longer represents a majority of the employees.

The Fifth Circuit also held that under section 303 Congress intended to include not only the initial certification, but the statutory process of altering or terminating certification, and a union, contending that the certified representative is no longer actively representing employees, must pursue the machinery before the Labor Board rather than to strike for recognition. The decision contains an interesting analysis of the predicament in which an employer finds himself where there is a certified union in the plant and he is faced with demands for recognition from a rival union. The Fifth Circuit stated at page 290:

> "We therefore, as does the Fourth Circuit in its recent decision, Tungsten Mining Corporation v. District 50, United Mine Workers of America, 242 F. 2d 84, 88, hold that, in the words of the Act, the decisive thing is the certification by the Board. Until by Board action it is effectually extinguished, it has continued vitality to protect an employer against a raiding rival whose objective is 'forcing or requiring [such] employer to recognize or bargain with * * * [it] * * * as the representative of [his] employees * * *.'"

In *Tungsten Mining Corporation v. District 50,* 242 F. 2d 84, the Fourth Circuit holds that the issuance and revo-

cation of certifications is exclusively within the province of the Labor Board and is binding upon all parties until Board action is taken in connection with the certification.

There are numerous cases which hold that the Labor Board's determination and certification of the bargaining agent is within its exclusive province. See *N. L. R. B. v. A. K. Allen Co.*, 252 F. 2d 37, 39, where it is said:

> "Under §9(b) of the Act, the Board has discretion to determine the appropriate bargaining unit. The Board's determination 'if not final, is rarely to be disturbed.' *Packard Motor Car Co. v. N. L. R. B.*, 330 U.S. 485, 491, 67 Supreme Court 789, 793, 91 L.Ed. 1040."

In *N. L. R. B. v. Sanson Hosiery Mills*, 195 F. 2d 350, an employer was found guilty of an unfair labor practice when he refused to honor a certification of a union as bargaining representative due to the fact that a majority of the employees no longer desired the certified union to represent them. The Fifth Circuit held that the certification of a union as bargaining representative by the National Labor Relations Board when lawfully made must be respected by an employer until changed conditions are reflected by a later ruling by the Board setting aside the certification. It is further held that an employer cannot decide for himself whether a union has lost its bargaining status as the certified bargaining representative, and, deciding that the union has lost its bargaining status, refuse to deal with it further, since that is a matter for determination by the Board. At page 195 F. 2d 350, 352, it is said:

> "Such a certification, when lawfully made, must be respected by the employer until changed conditions are reflected by a later ruling by the Board altering or

> setting aside the certification. This is true, even though the bargaining agent so designed has lost its majority representation of the employees by reason of the subsequent defection of some of those originally voting for it as their representative. *The existing certification must nevertheless be honored until lawfully rescinded.*" (Emphasis added.)

Again at 195 F. 2d 350, 352-353, the Court says:

> "Nor can the employer decide for itself whether the Union has lost its bargaining status, and deciding that it has, refuse to deal with it further. Whether or not the Union has lost that status is for the Board to determine upon orderly statutory procedure. N.L.R.B. v. Prudential, 6 Cir., 154 F. 2d 385, headnote 10. Meanwhile, it is the duty of the employer to deal with the duly certified Union."

If employers must honor certifications until lawfully rescinded, unions likewise must honor certifications until lawfully rescinded. In the words of Chief Judge Denman in *Capital Service v. N. L. R. B.,* 204 F. 2d 848, 853, "What was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act."

Let us assume for the moment that this action is abated and that some time in 1959 or 1960, it is found in proceedings against Respondent that it has illegally dominated, controlled and interfered with the certified union. What effect can that have on the legality of Appellants' actions in 1954? The Labor Board has already determined that the fact that Respondent may be dominating the certified union does not constitute a defense to picketing by Appellants for recognition while the certification is still in full force and effect. The Labor Board has already determined that the fact that the certified union may not

have been in compliance with filing requirements of the Act does not constitute a defense to picketing by Appellants for recognition so long as the certification is still in full force and effect.

The Labor Board has already held, in effect, that the outcome of its proceedings against Respondent can have no effect insofar as the legality of Appellants' actions in 1954 are concerned. This is the controlling determination made by the administrative body. Even if the doctrine of primary administrative jurisdiction is applicable, the administrative determination has been adverse to Appellants' contentions.

Of course, a person may sue in the courts when the administrative question has been settled in a prior administrative proceeding. This is true, even though he was not a party to such a proceeding. (*A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. Ed. 774.) There seem to be little question, however, that Respondent was a party to the prior administrative proceeding, since Respondent filed the charge against Appellants. See Section 102.8, Rules and Regulations of the National Labor Relations Board, defining a "party" to Board proceedings as including the person filing the charge.

The proceedings against Respondent can have no bearing on this litigation. The National Labor Relations Board has so ruled. (*Meat and Provision Drivers Union Local No. 626* (Lewis Food Company), 115 NLRB 890.) Therefore, no purpose can be served in abating this action pending a Labor Board hearing which can have no effect on the outcome of this case.

Conclusion.

The decision of the District Court, in refusing to abate the action, should be upheld for the following reasons:

1. The *Juneau Spruce* case holds that the District Court may proceed prior to a Labor Board determination of unfair labor practices.

2. The Labor Board has already made its decision that the proceedings against Respondent can have no effect on the outcome of this case since the Board's certification of a bargaining agent is valid and must be respected by Appellants, until revoked or rescinded by the Board, or higher authorities, in appropriate legal proceedings.

Respectfully submitted,

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